Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

KEITH ROONEY, by and through his next best friend, JOHN ROONEY, JR., his father; JOHN ROONEY, III; JOHN ROONEY, JR.; and MARSHA ROONEY, his wife,

Petitioners,

v.

GEORGE LEE WATSON, individually and in his official capacity, and the COUNTY OF VOLUSIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether a substantive due process violation exists under 42 U.S.C. § 1983 when a deprivation of life and property occurs from a non-pursuit high-speed crash resulting from a police agency's "custom or policy" and/or "failure to train" its deputies.

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I. Review is warranted because the opinion of the Eleventh Circuit conflicts with prior decisions of this Court and the Third, Fourth and Ninth Circuits (the last of which review is pending) on a significant matter of interpretation of 42 U.S.C. § 1983, i.e., whether a substantive due process violation exists when a deprivation of life and property occurs from a non-pursuit high-speed crash resulting from a governmental agency's "custom or policy" and/or "failure to train", and it is of national importance to create uniformity in the treatment of these cases 11

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PETITION FOR A WRIT OF CERTIORARI

Keith Rooney, John Rooney III, John Rooney, Jr., and Marsha Rooney respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 101 F.3d 1378 and is reprinted in the Appendix to this Petition at App. 1-10.

The Order of the United States District Court for the Middle District of Florida granting summary judgment in this case was not reported. It is reprinted in the Appendix at App. 11-22.

JURISDICTION

The Circuit Court of Appeals issued its opinion upholding the district court on December 26, 1996. Petitioners timely filed a Motion for Rehearing/Suggestion of Rehearing En Banc to the Eleventh Circuit, which was denied on May 22, 1997. App. 23-24.

Petitioners invoke this court's jurisdiction to review the opinion of the Eleventh Circuit under 28 U.S.C. § 1254(1).

STATUTORY, CONSTITUTIONAL PROVISIONS AT ISSUE

Title 42, United States Code, Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fourteenth Amendment to the United States Constitution, Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 14, 1993, the Petitioners brought suit against the Respondents in the United States District Court, Middle District of Florida, charging them with violating Petitioners' civil rights and with a state law claim. App. 25-31. Jurisdiction was premised upon 28 U.S.C. § 1343(a)(3) and 28 U.S.C. § 1331 for the federal cause of action, and pendent jurisdiction over the state claim. The complaint was amended once and the Petitioners sought to amend a second time, which matter was pending when the Respondents filed a Motion for Summary Judgment on the federal claim.

On January 23, 1995, the District Court entered summary judgment on the civil rights claim set forth in the First Amended Complaint, finding the Petitioners did not suffer a "constitutional deprivation", and declined to exercise its supplemental jurisdiction over the state law claim. App. 11-22.

On February 16, 1996, Petitioners appealed the District Court's Order to the Eleventh Circuit Court of Appeals, which upheld the district court's decision.

A. The Parties and Incident Below

On January 23, 1989, at approximately 9:05 p.m., the Petitioners, JOHN ROONEY III and KEITH ROONEY, "met" the Respondent, GEORGE LEE WATSON, in a high-speed crash on a rural road in Volusia County, Florida. Sheriff's deputy George Watson was operating his patrol vehicle pursuant to a *de facto* custom and policy of

the Volusia County Sheriff's Office by driving at excessively high speed without lights or sirens. Watson was not involved in a pursuit or any other type of emergency call; rather, he was just "cruising", as he characterized it. He was traveling at 82 miles per hour in a 55 mile-per-hour speed zone. It was not his first accident with his patrol vehicle, and he – as well as all other Volusia County deputies – was never trained to operate his vehicle at high speeds.

The Rooney boys were in their truck attempting to make a turn, traveling at less than 10 miles per hour. Watson's oncoming vehicle struck them nearly head-on at about 73 miles per hour, the decrease in speed attributed to his going off the edge of the roadway into the direction of the boys' truck, and possible slowing. Had Watson been doing the speed limit, the Rooneys would have cleared the intersection and there would have been no collision. After the vehicles flipped around and came to rest, John released himself from his seat belt/shoulder harness and pulled his unconscious brother from the truck.

The truck then exploded in flames from the impact. It was at that time that John first noticed that the vehicle that struck his was a sheriff's patrol car.

Keith lay in a coma for nine days with substantial head injuries. John lost his front teeth and sustained a gash to his chin. Watson was barely injured. Keith sustained the worst injuries, suffering a closed head injury that permanently impairs his cognitive and other functions. His treating physicians estimate the former "A" student is 50 percent permanently partially disabled.

B. The Claims and Record Evidence Below

Petitioners sued George Watson and Volusia County for violating their civil rights, and for state law negligence. The civil rights count of their complaint, after stating that Watson was acting under color of state law, alleges, *inter alia:*

> WATSON was acting pursuant to a persistent and widespread practice of VOLUSIA COUNTY's Department of Public Safety, in which he and fellow VOLUSIA COUNTY employees operated their county vehicles, i.e., dangerous instrumentalities, with indiscriminate use of speed. Speeding by sheriff's deputies in VOLUSIA COUNTY for non-emergency matters, particularly without the use of lights or sirens, was a common and widespread practice of which the Defendant VOLUSIA COUNTY had actual or constructive knowledge and failed to correct, displaying a deliberate indifference toward police misconduct that had a tendency to violate, and did violate, citizens' civil rights. Additionally or in the alternative, VOLUSIA COUNTY improperly trained their deputies, including Defendant WATSON, in the use of their vehicles, particularly in the specific use and handling of the vehicles at high speeds. This policy of indiscriminate use of speed violated citizens' constitutional rights such that the need for further training was or should have been plainly obvious to VOLUSIA COUNTY policymakers who, at least until the time of this accident, were deliberately indifferent to the need.

App. 28. Petitioners further alleged that

> Defendant VOLUSIA COUNTY'S tacit knowledge and approval of Defendant WATSON'S indiscriminate use of high speed, and/or VOLUSIA COUNTY'S failure to properly train deputies including WATSON in the proper use of their vehicles at high speeds, subjected the Plaintiffs to a deprivation of their rights to life, liberty and property; their rights to procedural due process; and their rights to travel protected by the privileges and immunities clause, all guaranteed by the United States Constitution.

App. 29.

In the light most favorable to Petitioners, their record evidence consisted of testimony from several witnesses who described a long-term, recurring problem in Volusia County involving deputies indiscriminately speeding when not in pursuit or answering an emergency call. Each independently witnessed Volusia County sheriff's deputies over many years routinely exceeding the speed limit while not on emergency calls. They had been alarmed by the deputies' speed on many occasions, even fearing for their own safety. The deputies do this on various roadways, including Highway 11 where the accident took place. One witness even wrote a letter to the editor of one of the local newspapers about the problem, stating that the "stretch of road called International Speedway Boulevard is truly a raceway for the sheriff's department vehicles."

After reviewing voluminous testimony and Volusia County records, Petitioners' police practices expert witness testified that this crash wasn't an isolated incident or

unusual behavior for the Volusia County sheriff's office. He stated, *inter alia*, that: (1) the Volusia County sheriff's department knew or should have known that deputies exceeded the speed limit or otherwise engaged in dangerous driving practices and, consequently, are disproportionately at risk of becoming involved in accidents; (2) Volusia County sheriff's deputies indiscriminately used speed in their day-to-day duties or otherwise engaged in dangerous driving practices; (3) Volusia County failed to initiate and maintain reasonable policies relevant to poor driving performance that would stop the dangerous conduct; and (4) this collective activity led to an environment where deputies were not held accountable for these dangerous driving practices, they knew it, and that made Watson's accident with the Rooneys foreseeable as well as preventable. He also testified that the weapons police officers utilize in their day-to-day tasks are guns and vehicles, and that a police vehicle greatly exceeding the speed limit without lights or sirens is more dangerous because the other drivers are not on notice (by the lights and sirens) of the vehicle's speed.

Petitioners' record testimony also showed that no deputy had been trained in the use of his police vehicle in rookie school. During attendance at police academy, none had received training regarding how to operate a police motor vehicle in emergencies, at high speeds or for special police work – or even for routine police work. They were given their badges, guns and cars, and sent out on the road.

By 1975, former (late) Sheriff Edwin H. Duff II recognized that "[a]ccidents envolving [sic] police vehicles are costing law enforcement agencies a substantial amount in

personal injuries to officers, loss of productive time, repair costs to vehicles, as well as personal injury and property damage to others." Again, in 1977, Duff acknowledged an increase in law enforcement accident rates and sought a grant to construct and run an Emergency Vehicle Operations Course. In the documentation supporting the proposal, Duff wrote:

> "The National Highway Traffic Safety Administration estimates that of 250,000 high-speed police pursuits every year, nearly 8,000 end in crashes, with some 400 people killed and 5,000 injured." [footnote omitted]
>
> Statistics further indicate that the likelihood of a law enforcement patrol vehicle being involved in a *non-pursuit* accident is even greater. . . . [emphasis in original]

With this knowledge in hand, Volusia County established an Emergency Vehicle Operations Course (EVOC). This was a course purportedly designed to train law enforcement officers how to operate their vehicles – except they were *not* taught high-speed driving. The exercises they participated in were low-speed (25-30 mph), high-maneuverability. The course was devoid of any training for use of law enforcement vehicles at high speeds.

George Watson had taken this course twice – the first time while employed by a prior police department after he had an accident with his law enforcement vehicle, the second time after being hired by Volusia County. Nonetheless, Watson had two more auto accidents with his Volusia County patrol vehicle after taking the EVOC courses, one prior to the one with the Rooneys and the

one involving the Rooneys. After the Rooney accident, he was not disciplined; rather, he was given a promotion to the detective bureau.

Petitioners' police practices expert witness also testified, in addition to the matters discussed above, that Volusia County failed to properly train their deputies in the use of their vehicles, particularly at high speeds.

In summary, in the light most favorable to Petitioners, the record evidence showed that a law enforcement officer was on a routine patrol, not in pursuit or responding to an emergency; he was exceeding the speed limit by 50 percent for no legitimate reason, and was not utilizing lights or sirens to indicate his high speed; he had been involved in prior accidents with his patrol vehicles; his high-speed behavior was persistent and widespread in his department, and such behavior, because of the agency's lack of discipline for engaging in it, was essentially encouraged by the department; he was following that persistent and widespread policy that night; his department failed to train him in the use of that vehicle at such excessive, dangerous speeds; and all of the foregoing led to the crash with the Rooneys. These are the general facts upon which Petitioners' civil rights claim were based, and which supported their position on summary judgment below.

C. The Proceedings Below

The district court found, under the facts of this case and the First Amended Complaint, that Petitioners did not suffer a "constitutional deprivation". Relying upon *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986), the court

stated that Deputy Watson's "negligence or even gross negligence" was insufficient to give rise to § 1983 liability; that the "custom or policy" and "failure to train" evidence in this case was of no import or consequence because there was no constitutional violation in the first place. App. 14. The district court entered summary judgment in favor of the defendants on the § 1983 claim, and declined to exercise supplemental jurisdiction over the remaining state law claim.

The Eleventh Circuit upheld this decision in all respects, finding that inquiries into "custom and policy" or "failure to train" would only be relevant when a constitutional deprivation has occurred; since the deputy's conduct in this case did not cause the Petitioners to suffer a constitutional deprivation, there was no need to make the inquiry. App. 7, 9.

REASONS WHY CERTIORARI SHOULD BE GRANTED

The opinion of the Eleventh Circuit conflicts with prior decisions of this Court and other Circuits, creating confusion and lack of uniformity in the treatment of these issues. Consequently, this case presents the Court with an opportunity to clarify these issues and provide guidance for litigants nationwide. Additionally, this court has already granted review in a similar case, *County of Sacramento, Sacramento County Sheriff's Department and James Everett Smith, Petitioners, vs. Teri Lewis and Thomas Lewis, Personal Representative of the Estate of Philip Lewis, Respondents,* No. 96-1337, and a grant of review in this case will

give the court the rare opportunity to resolve related issues of supreme national importance at one time.

I.

Review is warranted because the opinion of the Eleventh Circuit conflicts with prior decisions of this Court and the Third, Fourth and Ninth Circuits (the last of which review is pending) on a significant matter of interpretation of 42 U.S.C. § 1983, i.e., whether a substantive due process violation exists when a deprivation of life and property occurs from a non-pursuit high-speed crash resulting from a governmental agency's "custom or policy" and/or "failure to train", and it is of national importance to create uniformity in the treatment of these cases.

The Eleventh Circuit's opinion flatly held that the Petitioners here did not suffer a constitutional deprivation, i.e., that the Rooneys were not deprived of any rights, privileges, or immunities guaranteed under the Constitution or laws of the United States. App. 9. Viewing the deputy's behavior as negligence or even gross negligence, the court found it did not have to reach the question of whether "custom or policy" and/or "failure to train" prompted the deputy's behavior to comprise the substantive due process violation. App. 7. That holding contradicts previous opinions of this Court and the Third, Fourth and Ninth Circuits. The practical effect of the Eleventh Circuit's decision is to allow police agencies with such policies or customs and/or which do not properly train their officers to do so with federal impunity and no incentive to correct their conduct. More importantly, it creates confusion among the circuits because other circuits have found that a deprivation of life, liberty

or property resulting from an agency's "customs or policies" and/or "failure to train" constitutes a violation of substantive due process violations.

A. Custom or Policy

Since at least 1978, this court has acknowledged that local governments can be sued under 42 U.S.C. § 1983 for constitutional deprivations "visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691-692, 98 S.Ct. 2018, 2036 (1978). This Court also recognized, in 1981, that "life, liberty or property" losses which occur not in the vacuum of simple negligence, but rather as a result of "some established state procedure", are indeed cognizable due process violations under the Fourteenth Amendment. *Parratt v. Taylor*, 451 U.S. 527, 544, 101 S.Ct. 1908, 1917 (1981), *overruled in part, Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986). This Court made it clear that a party involved in "nothing more than" an automobile accident with a state official, for example, could not suffer a Fourteenth Amendment deprivation. 451 U.S. at 544, 101 S.Ct. at 1917. Under *Parratt*, then, if the state procedure is what led to the accident, a Fourteenth Amendment violation would indeed exist. The Eleventh Circuit failed to follow this principle of law in the case below, refusing to acknowledge that the Rooneys' loss of life and property as a result of Volusia County's customs or policies was a substantive due process deprivation.

The *Parratt* holding was approved once again in *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427 (1985), where this court reiterated the requirement that the municipal policy "must be 'the moving force of the constitutional violation' ". 471 U.S. at 821, 105 S.Ct. at 2434 (citing *Polk County v. Dodson*, 454 U.S. 312, 326, 102 S.Ct. 445, 454 (1981)). In this case the Rooneys' pleadings and record evidence show that Volusia County's customs and policies were what led to George Watson's high-speed conduct and, consequently, their loss of life and property.

Parratt was partially overruled by *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986), decided with the companion case of *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668 (1986). In these cases, which tested the efficacy of the Due Process clause, this court said its role was to determine when tortious conduct rises to the level of a constitutional tort, or deprivation. *Daniels*, 474 U.S. at 329, 106 S.Ct. at 664. In *Daniels*, the prisoner-plaintiff alleged he was deprived of "liberty without due process" of law when he slipped on a pillow negligently left on prison stairs. This court concluded that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." 474 U.S. at 329, 106 S.Ct. at 663. Adopting Justice POWELL'S concurrence in *Parratt*, the court agreed that the word "deprive" in the Due Process Clause connotes more than a negligent act, and that the federal courthouse doors should not open to § 1983 lawsuits "where there has been no affirmative abuse of power." *Id.* On that basis, this court overruled that a portion of *Parratt* holding that mere lack of due care may constitute

a "life, liberty or property" deprivation under the Fourteenth Amendment.

In *Davidson*, the prisoner-plaintiff claimed he was deprived of his Fourteenth Amendment "liberty" interest when he suffered an attack by another inmate after informing prison officials he received a threat that he would be beaten. Once again characterizing the single incident as one lacking in due care, rather than approaching "the sort of abusive government conduct that the Due Process Clause was designed to prevent", 474 U.S. at 348 (citing *Daniels)*, this court refused to find a Fourteenth Amendment deprivation. Significantly, however, this Court stated that the *Davidson* facts were "quite different from one involving injuries caused by an unjustified attack by prison guards themselves . . . or by another prisoner where officials simply stood by and permitted the attack to proceed. . . . " *Id.* In this case, it could be said that the Rooney boys were unjustifiably "attacked" by George Watson's indiscriminate use of his vehicle, caused by Volusia County's custom or policy that essentially permitted this "attack" to occur.

The Eleventh Circuit, however, overlooked *Daniels* and *Davidson* and relied instead upon its 1986 decision in *Cannon v. Taylor,* 782 F.2d 947 (11th Cir. 1986), which was issued one month after those decisions and did not cite to either. In *Cannon*, the Plaintiff's decedent was an innocent motorist killed by a police officer responding to an emergency call in his patrol car. *Id.* at 948. Officer Taylor was in violation of department policy by not utilizing his lights and sirens during the emergency call. *Id.* The plaintiffs claimed the police officer violated the decedent's right to life without procedural due process, and that the

city did also via a policy that authorized police to drive at excessive speeds without lights and sirens and by failing to properly train their officers. *Id.* at 948-949. Regarding the claim against the individual officer, the Eleventh Circuit held that "a person injured in an automobile accident caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no section 1983 cause of action for violation of a federal right." *Id.* at 950. As to the claim against the city, the court found the Plaintiff failed to establish record evidence showing officials "disregarded instances of officer misconduct which threatened or deprived the rights of city residents." *Id.* at 951.

As to simple negligence cases, *Cannon* has support in *Daniels* and *Davidson*. However, its applicability to substantive due process claims implicating "custom or policy" and/or "failure to train" is erroneous and contrary to this court's well-established precedent. Here, the Rooneys did not plead or show *a negligent act* of an official causing *unintended* loss of or injury to their lives and property. Nor did they plead it in the context of a solitary accident involving a sheriff's deputy. Rather, it has been pleaded, and proven through record evidence, in the context of an ongoing misuse of the weapons of governmental power. This case demonstrates a peace officer's abuse of police power, which came about as a result of his adherence to his department's policy of misuse of police power, which was so common and widespread that life and property deprivations were certain to result and did result (e.g., Deputy Watson's prior accidents and Sheriff Duff's acknowledgment of the injuries and damages associated with the ongoing problem of pursuit and

non-pursuit accidents), the Department knew or should have known of the consequences of this policy and had a duty to correct it, and it did not do so. These officials – entrusted with state law, wearing the badge of state law, and bound to enforce state law, violated state law – regularly and, up until now, with federal impunity. There is no clearer definition of abuse of power.

This court continued to acknowledge substantive due process violations stemming from abuses of governmental power in cases from 1990 and 1992. In *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975 (1990), this court returned to its roots in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961), reiterating that that decision rejected the view that § 1983 does not reach abuses of state authority. 494 U.S. at 124, 110 S.Ct. at 982. The Fourteenth Amendment does indeed bar "certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.' " 494 U.S. at 125, 110 S.Ct. at 983 (citing *Daniels*, 474 U.S. at 331, 106 S.Ct. at 664). The circumstances of this case fall under that umbrella, and the Eleventh Circuit should have recognized that.

In *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 112 S.Ct. 1061 (1992), this court further stated that "[o]ur cases do not support the Court of Appeals' reading of § 1983 as requiring proof of an abuse of governmental power separate and apart from the proof of a constitutional violation." 503 U.S. at ___, 112 S.Ct. at 1065. Otherwise stated, the abuse of governmental power *is* the constitutional violation. The Eleventh Circuit, however, held that the Rooneys did not suffer a constitutional deprivation and, therefore, it need not reach the "custom

or policy" or "failure to train" issues. That decision requires the Rooneys to do just what *Collins* says they should not have to do: Show a constitutional violation separate and apart from the abuse of governmental power they pled and proved via Volusia County's "custom or policy" and/or "failure to train." Furthermore, the Eleventh Circuit's decision also leaves litigants in doubt as to what more than life and property deprivations must be shown in these cases. Its decision is in direct conflict with this court's principles of law.

The Eleventh Circuit's opinion on this point is also directly in conflict with two other Circuit Court opinions. The Fourth Circuit Court of Appeals, in *Revene v. Charles County Commissioners*, 882 F.2d 870 (4th Cir. 1989), found abuse of police power was a substantive due process violation under facts less compelling than those here. In *Revene*, a sheriff's deputy who was off duty, not in uniform, and driving his personal vehicle followed the Plaintiff's decedent to his home, got out of his vehicle, produced a handgun, pointed it at the decedent, and shot and killed him. There was no claim of a Fourth Amendment arrest or detention. The Fourth Circuit, reading the allegations as asserting the deputy was acting under color of state law[1] by conducting official police action, stated that these facts could be viewed "as consistent with an officer's '[m]isuse of power . . . possessed by virtue of state law,' which of course falls within § 1983." *Id.* at 873-874 (citing *Monroe v. Pape*, 365 U.S. at 183-186). Here, there is no question that Deputy Watson was on

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[1] Under county law there, deputies are considered on duty 24 hours a day. *Id.* at 873.

duty that night. Whether he misused his police power in the context of using his gun to injure the Petitioners or by using his cruiser to injure them is a distinction without significance: He misused his police power, depriving the Rooneys of life and property. The Fourth Circuit agreed that the civil rights claim in that case should not have been dismissed, and reinstated it along with the pendent state law claim, which arose from a common nucleus of operative fact. The Eleventh Circuit here disposed of it by entry of summary judgment, and dismissed the state law claim. The Circuits are in direct conflict and in need of clarification of this issue.

The Eleventh Circuit opinion also conflicts with *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996), which was decided 20 days earlier and is currently on review by this court. Quoting *Daniels*, the Ninth Circuit in *Lewis* recognized that when a law enforcement official "arbitrarily acts to deprive a person of life and personal security in the course of pursuing his official duties, constitutional due process rights may be implicated." *Id.* at 439. In that case, the police undertook a high-speed pursuit of two juveniles on a motorcycle whose only digression was to drive away from an officer who yelled at them. *Id.* at 436. Like the Rooney boys, they had not violated the law; unlike the Rooneys, they were the subjects of the high-speed pursuit rather than victims of high-speed custom or policy. One of the boys died, and his parents brought suit under 42 U.S.C. § 1983 and California's wrongful death act. Here, the two boys were grievously injured and they and their parents brought suit under 42 U.S.C. § 1983 and Florida common law

negligence pursuant to its waiver of sovereign immunity act. The Ninth Circuit in *Lewis* unequivocally found the "underlying constitutional rights at issue here are substantive due process rights to life and liberty or personal security." *Id.* at 439. The Eleventh Circuit here found there was no constitutional deprivation, adhering to *Cannon*, which was also a pursuit case that killed an innocent motorist.

The circuits are in direct conflict, and Petitioners implore this court to resolve it for the benefit of victims nationwide. The substantive due process violation in the Rooney case is no different from that of *Lewis*. The fact that the Lewis boy died as a result of a high-speed pursuit, and Keith and John Rooney were grievously injured as a result of a high-speed non-pursuit custom or policy is factually insignificant. Both deputies were utilizing their patrol cars on duty at high speed. Indeed, if anything, the Rooney case is more compelling because George Watson had *no reason* to do what he did; Deputy Smith of Sacramento had a colorable, albeit insufficient, reason to engage in his high-speed conduct.

B. Failure to Train

The Eleventh Circuit's refusal to recognize that failure to train constitutes a substantive due process violation also contradicts prior decisions of this court and decisions of the Third and Ninth Circuits.

This court first recognized municipal liability for failure to train under § 1983 in limited circumstances in *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989). There, this court held that "the inadequacy of

police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come in contact." 489 U.S. at ___, 109 S.Ct. at 1204. In describing the circumstances under which a claim can be made, this court said:

> The issue in a case like this one, however, is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent 'city policy'. . . . But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury. . . . [T]he focus must be on adequacy of the training program in relation to the tasks the particular officers must perform.

489 U.S. at ___, 109 S.Ct. at 1205-1206. The Rooneys' complaint unequivocally pleads the requisites of *City of Canton*, App. 28, and their record evidence on summary judgment supports these claims. Volusia County knew its deputies would come in contact with others through the use of their vehicles at high speed, and it utterly failed to train them for that task. The Eleventh Circuit failed to follow this Court's precedent when it refused to recognize the Rooneys' life and property deprivations suffered

as a result of Volusia County's failure to train Deputy Watson in the use of his vehicle at high speeds as a substantive due process violation.

This court upheld the *City of Canton* police failure-to-train standards in an unsafe workplace case, although it refused to find a substantive due process violation in that particular case. *Collins*, 503 U.S. at ___, 112 S.Ct. at 1068. There, the plaintiff's decedent was killed after being ordered into an unsafe manhole to fix a sewer line. 503 U.S. at ___, 112 S.Ct. at 1064. The § 1983 claim alleged the Decedent had a substantive due process right to be adequately trained or warned about hazards in the workplace. *Id.* The complaint alleged the city violated those rights by its custom or policy of not training its employees about the dangers of working in sewer lines and manholes, not providing safety equipment, and not providing safety warnings. *Id.* Reiterating the rule of *City of Canton*, this court said "inadequate training of police officers could be characterized as the cause of the constitutional tort if – and only if – the failure to train amounted to 'deliberate indifference' to the rights of persons with whom the police come in contact." *Id.* at 1068. This Court then distinguished the *Collins* case from police cases and found no constitutional deprivation there. The Rooney case is a police failure-to-train case, and it falls squarely under the rule in *City of Canton*. The Eleventh Circuit, however, refused to even consider this claim, requiring the Rooneys to set forth a constitutional deprivation separate and apart from Volusia County's failure to train.

The Eleventh Circuit opinion here also conflicts with those of two Circuits, the Third and the Ninth. In *Fagan v.*

City of Vineland, 22 F.3d 1283 (3rd Cir. 1994), *on rehearing en banc*, 22 F.3d 1296 (3rd Cir. 1994), the court held a city could be liable for a substantive due process violation if its policymakers,

> acting with deliberate indifference, implemented a policy of inadequate training and thereby caused the officers to conduct the pursuit in an unsafe manner and deprive the plaintiffs of life or liberty. . . . If it can be shown that the plaintiff suffered that injury, which amounts to a deprivation of life or liberty, because the officer was following a city policy reflecting the city policymakers' deliberate indifference to constitutional rights, then the City is directly liable under section 1983 for causing a violation of the plaintiff's Fourteenth Amendment rights.

22 F.3d 1292. Thus, if the city's failure to train causes an officer to deprive a plaintiff of his life, liberty or property, the city has violated the plaintiff's Fourteenth Amendment rights. *Id.* Even though the Rooney incident did not result from a high-speed pursuit, it resulted from inappropriate high-speed conduct, the reason for engaging in which is less compelling. The Eleventh Circuit's opinion is directly in conflict with this principle of law by its failure to recognize the Rooneys' life and property deprivations in the context of Volusia County's failure to train.

The Ninth Circuit in *Lewis* also recognized a municipality's failure to train its police officers constituted a substantive due process violation. 98 F.3d at 438. Like the Rooney case, the *Lewis* case did not implicate the Fourth or Eighth Amendments, although it did implicate the officer's use of his vehicle at high speed. In the *Lewis* case, the trial court's entry of summary judgment for the

agency on the failure-to-train claim was upheld. The Ninth Circuit found that, because the deputy there did indeed receive training in the use of his vehicle at high speeds, albeit not specifically for high-speed pursuits, the sheriff's department procedures were not deliberately indifferent. *Id.* at 446. Volusia County, on the other hand, utterly failed to train its deputies in the use of their vehicles at high speeds, knowing full well that such indiscriminate use of its vehicles was taking place and causing injury. The Eleventh Circuit's failure to follow this principle of law places its decision in direct conflict with the Ninth Circuit in *Lewis*.

Petitioners respectfully submit that the proper legal principle recognizes deprivations of life, liberty or property resulting from governmental customs or policies and/or failure to train as substantive due process violations. The Eleventh Circuit's opinion holding otherwise is not only in error, but places the circuits at odds. The foregoing arguments illustrate the state of confusion in the Circuits and a desperate need for clarity nationwide on these important principles of law. That the court has already granted review in a similar case, *Lewis*, demonstrates the supreme importance of these issues. This case gives the court the additional opportunity to provide the direction needed in both pursuit and non-pursuit cases. Petitioners respectfully request this court avail itself of the opportunity presented.

CONCLUSION

Based on the foregoing, Petitioners respectfully submit that this petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 19, 1997

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John ROONEY, III, John Rooney, Jr., Marsha Rooney, Keith Rooney, By and Through his Next Best Friend, John Rooney, Jr., his father, Plaintiffs-Appellants,

v.

George Lee WATSON, individually and in his official capacity, County of Volusia, Defendants-Appellees,

Department of Public Safety, Volusia Co., Defendant.

No. 95-2255.

United States Court of Appeals,
Eleventh Circuit.

Dec. 26, 1996.

Motorists who collided with deputy sheriff while he drove at high rate of speed in nonemergency, nonpursuit situation brought § 1983 action against deputy and county. The United States District Court for the Middle District of Florida, No. 93-32-CIV-ORL-22, Anne C. Conway, J., granted summary judgment for defendants. Plaintiffs appealed. The Court of Appeals, Hatchett, Chief Judge, held that deputy's conduct, even if grossly negligent, did not result in constitutional deprivation.

Affirmed.

ANDERSON, Circuit Judge, issued concurring opinion.

Before HATCHETT, Chief Judge, ANDERSON, Circuit Judge, and WOOD*, Senior Circuit Judge.

HATCHETT, Chief Judge.

Following *Cannon v. Taylor*, 782 F.2d 947 (11th Cir.1986), the court affirms the district court's granting of summary judgment to a county and a deputy sheriff after finding that no constitutional deprivations resulted from an automobile accident.

BACKGROUND

On January 23, 1989, John Rooney III was driving his parents' truck, and his younger brother, Keith Rooney, was a passenger. George Watson, a deputy sheriff in Volusia County, Florida, while on duty, was driving his patrol vehicle southbound on Highway 11 traveling at approximately 82 miles per hour. The Rooneys were traveling northbound on Highway 11 and at Reynolds Road attempted to make a left turn. Watson's patrol vehicle struck the Rooneys' vehicle. At the time of impact, Watson's vehicle was traveling approximately 73 miles per hour. Watson was neither engaged in a police pursuit nor responding to an emergency call, and he did not have his lights or sirens operating. As a result of the accident, Keith Rooney sustained severe head injuries and John Rooney sustained bodily injuries and lost teeth. Watson was not seriously injured.

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* Honorable Harlington Wood, Jr., Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

On January 14, 1993, John Rooney, Jr., Marsha Rooney, John Rooney III, and Keith Rooney filed suit against Deputy Watson and Volusia County claiming constitutional violations under § 1983 and state law negligence claims. Following the completion of discovery, the appellees moved for summary judgment. The district court granted the appellees' motions for summary judgment on the federal civil rights counts on January 23, 1995, and in the same order declined to exercise supplemental jurisdiction over the state law claims. In granting the appellees' motions for summary judgment, the district court relied on *Cannon v. Taylor*, 782 F.2d 947 (11th Cir.1986).

CONTENTIONS

The Rooneys contend that Watson's conduct amounted to a constitutional deprivation. They argue that their case is distinguishable from *Cannon* because Volusia County had a *de facto* custom and policy that encouraged indiscriminate speeding and grossly negligent driving. They assert that Keith Rooney was deprived of a normal life, John Rooney III was deprived of a normal life, and John, Jr. and Marsha Rooney were deprived of their property, the truck, due to Volusia County's longstanding policy of allowing recklessness in the operation of patrol vehicles.

The Rooneys claim that the distinction between their case and "police-chase" cases that refused to find a constitutional violation is that this was not a "police-chase" case. In this case, Deputy Watson was not engaged in any pursuit of any kind. They contend that Volusia County's

refusal to prevent reckless driving among patrol vehicles could have led a reasonable jury to find that it amounted to a deliberate indifference to the rights of third parties. They also argue that the district court confused the role of custom and policy in this allegation with the separate claim against Volusia County for failure to properly train and supervise, and as a result, the district court reached the wrong result. The Rooneys assert that the trial court failed to make the distinction between their claim for deprivation of life, liberty and property through a policy or custom, and their claim for deprivation of their constitutional rights through a failure to train or supervise. They contend that the Supreme Court recognized a "failure to train" as a cognizable civil rights claim in *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

Watson and Volusia County contend that the district court properly granted summary judgment to them because the Rooneys failed to prove a constitutional deprivation actionable under section 1983. They argue that in order for the Rooneys to state a claim they must prove that a statute, ordinance, custom or policy of the government caused the government officer or employee to violate another's constitutional rights. Moreover, they argue that Deputy Watson was not a policy maker for Volusia County; that the Rooneys' claim of deprivation of substantive or procedural due process is not triggered by mere negligence; that Deputy Watson's actions cannot rise to an unreasonable seizure in violation of the Fourth Amendment; and that under this court's decision in *Cannon v. Taylor*, 782 F.2d 947 (11th Cir.1986), a negligent or even grossly negligent operation of a motor vehicle by a

policeman acting in the line of duty does not give rise to a cause of action for violation of a federal right under section 1983.

ISSUE

The sole issue we address in this appeal is whether the district court erred in granting summary judgment to the appellees in finding that no constitutional deprivation occurred.

DISCUSSION

Our review of a district court's decision to grant summary judgment is *de novo*. *Hale v. Tallapoosa Co.*, 50 F.3d 1579 (11th Cir.1995). We independently review the record to determine whether summary judgment was appropriate viewing the pleadings, depositions, answers to interrogatories and admissions on file together with affidavits, if any, to determine whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Celotex v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). In making our determination, we view the record in the light most favorable to the nonmoving party and with all reasonable inferences resolved in their favor. *Hale*, 50 F.3d at 1581.

I. Deputy Watson

The Rooneys brought this action under 42 U.S.C. § 1983 claiming that both Deputy Watson and Volusia County violated their constitutional rights to life, liberty,

property, procedural due process and travel under the United States Constitution. In order for the Rooneys to state a cause of action against Watson in his official capacity, we must determine (1) whether Watson's conduct alleged to have caused their harm occurred while he was acting under color of state law, and (2) whether his alleged conduct deprived the Rooneys of rights, privileges, or immunities guaranteed under the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912-13, 68 L.Ed.2d 420 (1981), *overruled on other grounds by, Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *see also Burch v. Apalachee Community Mental Health Servs., Inc.*, 840 F.2d 797, 800 (11th Cir.1988), *aff'd by, Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990).

Our decision in *Cannon v. Taylor*, 782 F.2d 947 (11th Cir.1986), directs our analysis in this case. In *Cannon*, a police officer responding to a disturbance call at a local pool hall in Columbus, Georgia, struck another vehicle, killing the driver of that vehicle. When responding to the call, the officer had neither his flashing lights nor siren activated even though he was traveling sixteen miles over the speed limit. Under Georgia law, at the time of the accident, police officers responding to emergency calls were allowed to exceed posted speed limits as long as they used their vehicles' flashing lights and siren. The decedent's family filed suit under 42 U.S.C. § 1983 claiming that the police officer and the city of Columbus deprived the decedent of her life without due process of the law through reckless and excessive speeding without the use of lights and sirens. In that decision, this court held "that a person injured in an automobile accident

caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no section 1983 cause of action for violation of a federal right." *Cannon*, 782 F.2d at 950. In reaching that conclusion, this court noted that it could not find any cases supporting the proposition that a police officer's negligence in operating his vehicle deprives an injured person of due process of law and that "automobile negligence actions are grist for the state law mill. But they do not rise to the level of a constitutional deprivation." *Cannon*, 782 F.2d at 949-50.

Under our reasoning in *Cannon*, Deputy Watson's single accident, whether we characterize it as negligence or even gross negligence causing the Rooneys' harm, does not amount to a constitutional deprivation. Although Watson was not responding to an emergency call, we believe *Cannon*'s holding dictates the result we reach. In this case, Watson was on duty and on patrol at the time of the accident. Under the reasoning of *Cannon*, we do not believe that any alleged negligence on Deputy Watson's part amounts to a constitutional deprivation simply because he was speeding in the absence of an emergency response or police pursuit. Perhaps his driving at a high rate of speed in a non-emergency or non-pursuit situation reveals gross negligence rather than negligence, but it does not transform a state tort claim into a constitutional deprivation under the circumstances of this case. Therefore, in the absence of a constitutional

deprivation, the Rooneys cannot sustain a cause of action against Watson under section 1983.[1]

II. County of Volusia

The Rooneys also assert that Volusia County maintained a custom or policy of allowing patrol vehicles to drive recklessly. Consequently, they argue that they should be able to establish their section 1983 claim based upon Volusia County's custom or policy that led to their constitutional deprivation. As the district court correctly pointed out, an inquiry into a governmental entity's custom or policy is relevant only when a constitutional deprivation has occurred.[2] *See Vineyard v. County of Murray, Ga.*, 990 F.2d 1207, 1211 (11th Cir.), *cert. denied*, 510 U.S. 1024, 114 S.Ct. 636, 126 L.Ed.2d 594 (1993).[3] Since we have determined that Deputy Watson's conduct did not cause the Rooneys to suffer a constitutional deprivation, we need not inquire into Volusia County's policy and custom relating to patrol vehicle operation and training. *See Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571,

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[1] The Rooneys may still maintain a cause of action under state law against Deputy Watson.

[2] The Rooneys also allege that Volusia County's failure to train officers for high speed vehicle operation leads to a cognizable cause of action under section 1983. The Rooneys cannot maintain this cause of action, however, because the automobile accident did not rise to a level of violating their constitutional rights.

[3] In *Vineyard*, we stated that "[o]nly when it is clear that a violation of specific rights has occurred can the question of § 1983 municipal liability for the injury arise." *Vineyard*, 990 F.2d at 1211.

1573, 89 L.Ed.2d 806 (1986) (finding that a departmental policy or regulation authorizing the use of constitutionally excessive force is not relevant when a person has not been deprived of a constitutional right as a result of actions taken by an individual police officer); *see also Roach v. City of Fredericktown, Mo.*, 882 F.2d 294, 297-98 (8th Cir.1989) (finding that a municipality may be held liable under section 1983 for inadequate training only after determining that the plaintiff has suffered a constitutional deprivation as a result of the municipal employee's conduct). Therefore, our finding that the Rooneys did not suffer any constitutional deprivation makes it unnecessary to consider Volusia County's policy or custom.[4]

CONCLUSION

Because we have determined that Deputy Watson's conduct did not deprive the Rooneys of any constitutional right, they cannot maintain a cause of action under section 1983. The district court's decision granting Deputy Watson's and the County of Volusia's motions for summary judgment is affirmed.

AFFIRMED.

ANDERSON, Circuit Judge, concurring:

I concur in the judgment. For the reasons indicated in Judge Hatchett's opinion, I agree that Deputy Watson did

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[4] A similar result obtains with respect to the Rooneys' other theories of liability based on a failure to train and unreasonable seizure.

not violate plaintiffs' constitutional rights. I also conclude that Volusia County did not violate plaintiffs' constitutional rights. I note that plaintiffs' only argument with respect to lack of training is the lack of high speed training *on the range*. However, I do not think that the lack of training on the range could be a contributing cause in this case. Deputy Watson did not lose control. Rather, the only possible causes of this accident are readily subject to training in the classroom (e.g., the obvious dangers of high speeds, especially at night, and in view of oncoming traffic). I note also that plaintiffs' evidence about speeding was vague and unhelpful and could not constitute the basis of liability on the county's part for a constitutional violation. In view of the evidence proffered by the plaintiffs in this summary judgment record, I readily conclude that plaintiffs have failed to show that Volusia County was deliberately indifferent in any manner that could have caused the accident.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

KEITH ROONEY,
etc., et al.,

Plaintiffs,

-vs- CASE NO. 93-32-CIV-ORL-22

GEORGIE LEE WATSON,
etc., et al.,

Defendants.
_____/

ORDER

(Filed Jan. 23, 1995)

This cause comes before the Court for decision on various pending motions. The Court has considered such motions, and issues the following rulings thereon.

Defendants' Motions for Summary Judgment

Plaintiffs Keith Rooney and John Rooney III were injured when the vehicle they were occupying was involved in a traffic accident with a sheriff's patrol vehicle driven by Defendant George Lee Watson. The accident occurred on the evening of January 23, 1989. Watson was "on duty" as a deputy sheriff at the time of the collision. It is undisputed that he was neither engaged in a police pursuit, nor responding to an emergency call. It is also undisputed that he was not operating his emergency lights and siren. The Rooneys' vehicle was struck when it turned left into the path of Watson's oncoming vehicle.

Plaintiffs' accident reconstructionist opines that Watson's vehicle was travelling approximately 82 m.p.h. prior to the collision, reduced to approximately 73 m.p.h. at the time of impact. Deposition of Joseph Wattleworth, Ph.D. (Dkt. 150) at 86. The speed limit was 55 m.p.h. at the site of the accident.

In their First Amended Complaint (Dkt. 88), Plaintiffs have asserted a federal civil rights count pursuant to 42 U.S.C. § 1983, and a supplemental state law negligence count under *Fla. Stat.* § 768.28. The pleading names as defendants Deputy Watson, individually and in his official capacity, and the County of Volusia.

The Defendants have moved for summary judgment on various bases. In connection with these Motions, the Court deems it necessary to consider only a single question: On the undisputed facts, does Deputy Watson's conduct amount to a constitutional deprivation, actionable under § 1983? The court concludes that this question must be answered in the negative.

Resolution of the issue is governed by *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986). In *Cannon*, a police vehicle responding to a disturbance call struck another vehicle. An occupant of the latter vehicle was killed. At the time of the accident, the police vehicle was travelling, without flashing lights and siren, at least 46 m.p.h. in a 30 m.p.h. speed zone. The plaintiffs alleged that the police officer "deprived [the decedent] of her life without due process of law by virtue of his reckless, excessive speeding without the use of lights and sirens." *Cannon*, 782 F.2d at 948-49.

After reviewing Supreme Court precedent, the Eleventh Circuit held that "a person injured in an automobile accident caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no section 1983 cause of action for violation of a federal right." *Id.* at 950. The court elaborated by stating:

> The type of negligence alleged in this case may well be actionable under state law. Automobile negligence actions are grist for the state law mill. But they do not rise to the level of a constitutional deprivation.

Id. (citation omitted).

The circumstances surrounding the accident in the instant case are materially indistinguishable from those in *Cannon*. That Deputy Watson's negligence, or even gross negligence, may have caused the accident is insufficient to give rise to § 1983 liability.[1] In light of *Cannon*, Deputy Watson's conduct simply is not actionable under § 1983.

In opposing the defense motions for summary judgment, Plaintiffs rely extensively on "custom or policy" evidence. However, a governmental entity's custom and policy is pertinent only when there has been a constitutional violation. *See Vineyard v. County of Murray, Ga.*, 990 F.2d 1207, 1211 (11th Cir. 1993) ("Only when it is clear that a violation of specific rights has occurred can the question of § 1983 municipal liability for the injury

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[1] Presumably, an allegation that Deputy Watson acted recklessly would not alter this result, since the plaintiffs in *Cannon* made such an allegation against the police officer in that case.

arise"). Since *Cannon* compels the conclusion that Deputy Watson did not violate the Rooneys' constitutional rights, the County of Volusia's policies concerning operation of patrol vehicles, and training in the operation of those vehicles, are immaterial. *See Los Angeles v. Heller,* 475 U.S. 796, 799 (1986) (*per curiam*) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have **authorized** the use of constitutionally excessive force is quite beside the point")[2]; *see also, Temkin v. Frederick County Com'rs,* 945 F.2d 716, 724 (4th Cir. 1991) ("A claim of inadequate training under section 1983 cannot be made out against a supervisory authority absent a finding of a constitutional violation on the part of the person being supervised"), *cert. denied,* 112 S.Ct. 1172 (1992); *Roach v. City of Fredericktown, Mo.,* 882 F.2d 294, 297-98 (8th Cir. 1989) (In order for a municipality to be liable under § 1983 for inadequate training, "there must first be an underlying violation of the plaintiff's constitutional

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[2] Despite determining that no constitutional violation had occurred, the Eleventh Circuit in *Cannon* nevertheless went on to address the municipality's "custom or policy" liability under § 1983. The appellate court affirmed the district court's ruling in favor of the city on that issue. The fact that the court in *Cannon* separately addressed the municipality's § 1983 liability does not alter this Court's conclusion that an underlying constitutional violation is a necessary predicate to governmental "custom or policy" liability under § 1983. *Cannon* predated *Heller,* so the Eleventh Circuit did not have the benefit of the Supreme Court's reasoning on the subject at the time it decided *Cannon.* Under *Heller,* once a court concludes that there was no constitutional violation, any separate analysis of a governmental entity's "custom or policy" liability is unwarranted.

rights by a municipal employee"); *Hinton v. City of Elmwood, Kan.*, 997 F.2d 774, 782 (10th Cir. 1993) ("A municipality may not be held liable [under § 1983] where there was no underlying constitutional violation by any of its officers"; citing *Heller*); *Thompson v. Boggs*, 33 F.3d 847, 858-59 and n. 11 (7th Cir. 1994) ("[J]ury verdict in favor of [police officer] on the question of whether he used excessive force precludes the possibility that [the plaintiff] could prevail" on his claim that a city and its police chief had a policy or custom of approving the officer's use of excessive force; citing *Heller*).[3]

For the foregoing reasons, the Defendants are entitled to summary judgment on the Plaintiffs' § 1983 claims (Count I of the First Amended Complaint).[4]

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[3] The Court declines to follow *Fagan v. City of Vineland*, 22 F.3d 1283, *on reh'g in part*, 22 F.3d 1296 (3d Cir. 1994), insofar as it stands for the proposition that a municipality can be held liable under § 1983 for failure to train its officers, even if no individual officer has violated the constitution. The Third Circuit's decision is contrary to the weight of authority and, more importantly, is inconsistent with *Heller*. *Fagan* and its rationale for distinguishing *Heller* have been flatly rejected in the recent decision of *Thompson v. Boggs*, 33 F.3d 847, 859 n. 11 (7th Cir. 1994). Additionally, for the reasons set forth in footnote 2 of this Order, *Fagan's* reliance on *Cannon's* discussion about municipality "custom or policy" liability is misplaced.

[4] In light of this conclusion, the Court need not address the Defendants' other summary judgment arguments directed at the § 1983 count.

Plaintiffs' State Law Claims

With the dismissal of the civil rights claims, the only claims remaining in this case are those seeking damages under state law for personal injury arising from a traffic accident. The Court must examine 28 U.S.C. § 1367, the statute governing supplemental jurisdiction, in order to determine whether to continue to exercise jurisdiction over the state claims.

Section 1367 provides, in pertinent part, as follows:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts shall have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.
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> * * *
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –
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> * * *
>
> (3) the district court has dismissed all claims over which it has original jurisdiction[.]
>
> * * *
>
> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal

> of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

It appears that the statute of limitations on the remaining state claims ran during the pendency of this suit. In light of that fact, before the advent of § 1367, it might have been an abuse of discretion for the Court to dismiss the state claims on the ground that the Court no longer had jurisdiction over the federal claim. *See Edwards v. Okaloosa County*, 5 F.3d 1431 (1993), *modified on denial of reh'g*, 23 F.3d 358 (11th Cir. 1994). However, such is no longer the case. Under § 1367(d), the statute of limitations on the state claims is tolled until 30 days after the date of this Order. *See U.S. Anchor Mfg., Inc. v. Rule Industries, Inc.*, 7 F.3d 986, 1005 (11th Cir. 1993) ("Under . . . § 1367(d), the statute of limitations would be tolled while the claims were pending until 30 days after an order of dismissal, thus allowing the plaintiff time for filing a new action in state court without the lapse of its rights"), *cert. denied*, 114 S.Ct. 2710 (1994); *Edwards*, 5 F.3d at 1433 n. 1; *Winn v. North American Phillips Corp.*, 826 F.Supp. 1424, 1427 n. 3 (S.D. Fla. 1993). Accordingly, the Plaintiffs will not be prejudiced from a statute of limitations standpoint by dismissal of the state claims.

This case has been pending for slightly more than two years. The complaint was filed in January 1993. In February 1994, the Court entered an Order (Dkt. 86) granting Plaintiffs leave to file an amended complaint. That Order further stated:

> The Court cautions the plaintiffs, and their counsel, however, that the Court is concerned

> whether plaintiff can assert a viable 42 U.S.C. § 1983 claim, so as to give the Court a basis for federal jurisdiction, in light of *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986) (person injured in automobile accident caused by negligent, or even grossly negligent, operation of motor vehicle by police officer acting in line of duty has no section 1983 cause of action for violation of federal right), and *Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (if police officer has not inflicted constitutional harm, municipality not liable for damages under section 1983; if person has suffered no constitutional injury at hands of individual police officer, fact that departmental regulations might have authorized use of constitutionally excessive force "is quite beside the point"). Accordingly, plaintiffs and their counsel must factor *Cannon* and *Heller* into their decision whether to file and serve an amended complaint.

Dkt. 86 at 2.

The authorities cited in the February 1994 Order are the same as those cited in this Order as the basis for granting Defendants summary judgment on the § 1983 count. Hence, even though the case has been pending for just over two years, the Plaintiffs were warned slightly more than a year after it was commenced that the Court might not have jurisdiction over the only federal claim they were asserting. Under these circumstances, the Court determines that the Plaintiffs will not be unfairly prejudiced by the dismissal of state claims that have been

pending in this court slightly more than two years, particularly since they will be able to refile the lawsuit in state court.[5]

Based on the foregoing discussion, and in light of the fact that the remaining state claims are of a type considered "grist for the state law mill", the Court determines that it should decline to exercise supplemental jurisdiction pursuant to § 1367(c)(3).[6]

Plaintiffs' Motion for Leave to Amend

Plaintiffs have filed a motion seeking leave to file a second amended complaint. The proposed pleading adds allegations of improper hiring, retention and supervision in the § 1983 count, and asserts an entirely new state law claim of negligent hiring and retention.[7]

The amendment to the civil rights count would be futile. Since the Court has determined, as a matter of law, that the conduct of Deputy Watson did not give rise to a constitutional violation, allegations that the County of Volusia improperly hired, retained and supervised him are no longer relevant to the § 1983 count. Moreover, the addition of the new state law cause of action would not

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[5] In this connection, the Court also finds significant that the Plaintiffs waited until nearly four years after the accident to commence this suit.

[6] In view of this conclusion, the Court will not reach the Defendants' summary judgment arguments directed at the state law claims.

[7] The proposed second amended complaint also corrects the Plaintiffs' city of residence.

alter the Court's decision not to exercise supplemental jurisdiction. In other words, the Court would dismiss the remaining state law claims even if they included those sought to be added.

For these reasons, the Court determines that leave to amend should not be granted.

Sufficiency of Summary Judgment Affidavits

Plaintiffs have filed a Motion (Dkt. 200) to strike certain affidavits filed by the County of Volusia in support of its motion for summary judgment. The County has responded by, *inter alia*, seeking leave to amend the challenged affidavits. *See* County of Volusia's Response to Plaintiffs' Motion to Strike and in the Alternative Motion to Amend Affidavits (Dkt. 202). The subject affidavits relate solely to the "custom or policy" issue, which the Court need not reach. Accordingly, both Motions will be denied as moot.

Conclusion

Based on the foregoing, it is ORDERED as follows:

1. Plaintiffs' Motion for Leave to Amend Complaint (Dkt. 102), filed July 8, 1994, is DENIED.

2. Plaintiffs' Motion to Strike Defendant Volusia County's Affidavits (Dkt. 200), filed December 9, 1994, is DENIED AS MOOT.

3. Insofar as it seeks leave to amend certain affidavits, Defendant County of Volusia's Response to Plaintiffs' Motion to Strike and in the Alternative Motion to

Amend affidavits (Dkt. 202), filed December 16, 1994, is DENIED AS MOOT.

4. Defendant County of Volusia's Motion for Summary Judgment Re: Count I of Plaintiff's Amended Complaint for Civil Rights Violation and for Personal Injuries (Dkt. 138), filed October 28, 1993, is DENIED AS MOOT, in light of the later-filed amendment (Dkt. 186) to such Motion.

5. The following Motions are GRANTED insofar as they seek summary judgment on the basis that Deputy Watson's conduct did not amount to a constitutional violation, actionable under 42 U.S.C. § 1983:

a. Defendant County of Volusia's Amended Motion for Summary Judgment Re: Count I of Plaintiffs' Amended Complaint for Civil Rights Violation and for Personal Injuries (Dkt. 186), filed November 16, 1994;

b. Defendant George Lee Watson's [Individual Capacity] Motion for Summary Final Judgment (Dkt. 176), filed October 28, 1994; and

c. Defendant George Lee Watson's [Official Capacity] Motion for Summary Judgment Re: Plaintiffs' Amended Complaint for Civil Rights Violation and for Personal Injuries (Dkt. 136), filed October 28, 1994.[8]

The Court does not reach the other summary judgment arguments advanced in these Motions.

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[8] The Memorandum (Dkt. 137) supporting this Motion expressly adopted the County of Volusia's summary judgment arguments.

6. The Clerk is directed to enter a judgment providing that the Plaintiffs shall take nothing on Count I of the First Amended Complaint, brought pursuant to 42 U.S.C. § 1983.

7. Plaintiffs' remaining claims, brought pursuant to *Fla. Stat.* 768.28 and set forth in Count II of the First Amended Complaint, are DISMISSED pursuant to 28 U.S.C. § 1367(c)(3).

8. Any other motions are DENIED AS MOOT.

9. The Clerk is directed to close this case.

DONE AND ORDERED in Chambers in Orlando, Florida, this 23rd day of January, 1995.

/s/ Anne C. Conway
ANNE C. CONWAY
United States
District Judge

Copies to: Counsel of Record
Judge's Secretary
Courtroom Deputy

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRUCIT

No. 95-2255

JOHN ROONEY, III; JOHN ROONEY, Jr.;
MARSHA ROONEY; KEITH ROONEY,
by and through his next best friend,
JOHN ROONEY, Jr., his father,

Plaintiffs-Appellants,

versus

GEORGE LEE WATSON, individually
and in his official capacity,
COUNTY OF VOLUSIA,

Defendants-Appellees.

DEPARTMENT OF PUBLIC
SAFETY, VOLUSIA CO.,

Defendant.

On Appeal from the United States District Court for the
Middle District of Florida

(Filed May 22, 1997)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion ___, 11th Cir., 19__, ___ F.2d ___).

Before: HATCHETT, Chief Judge, ANDERSON, Circuit Judge, and WOOD*, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
CHIEF JUDGE

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*Honorable Harlington Wood, Jr., Senior U. S. Circuit Judge for the Seventh Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

KEITH ROONEY, by and through his next best friend, JOHN ROONEY, JR., his father; JOHN ROONEY, III; JOHN ROONEY, JR.; and MARSHA ROONEY, his wife,

Plaintiffs,

vs.

GEORGE LEE WATSON, individually and in his official capacity, and the COUNTY OF VOLUSIA,

Defendants.
_____/

CASE NO.: 93-32-CIV-ORL-22

CIVIL DIVISION

FIRST AMENDED COMPLAINT FOR CIVIL RIGHTS VIOLATIONS AND FOR PERSONAL INJURIES

Plaintiffs, KEITH ROONEY, by and through his next best friend, JOHN ROONEY, JR., his father; JOHN ROONEY III; JOHN ROONEY, JR.; and MARSHA ROONEY, his wife, sue the Defendants, GEORGE LEE WATSON, individually and in his official capacity, and the COUNTY OF VOLUSIA and allege:

ALLEGATIONS COMMON TO ALL COUNTS

1. This action is a claim for damages in excess of $50,000, exclusive of interest, costs and attorneys fees, brought by Plaintiffs for violation of their civil rights

under 42 U.S.C. § 1983 and/or for personal injuries pursuant to *Fla. Stat.* § 768.28.

2. This Honorable Court has jurisdiction over the civil rights portion of this claim pursuant to 28 U.S.C. § 1343(a)(3) and 28 U.S.C. § 1331, as well as pendent jurisdiction over the personal injury count in this claim.

3. At the time the original Complaint was filed, Plaintiff, KEITH ROONEY ("KEITH"), was a minor residing with his parents, JOHN ROONEY, JR. and MARSHA ROONEY, in Deland, Volusia County, Florida. He brought this action by and through his next best friend, JOHN ROONEY, JR. At the time this First Amended Complaint is being filed, KEITH is of majority age and otherwise *sui juris*.

4. Plaintiff, JOHN ROONEY III ("JOHN III"), at all material times was a resident of Deland, Volusia County, Florida. He is *sui juris*.

5. Plaintiff, JOHN ROONEY, JR. ("JOHN JR."), at all material times was and is a resident of Deland, Volusia County, Florida, living in a marital relationship with his wife, MARSHA ROONEY. He is the father of Plaintiffs, KEITH and JOHN III.

6. Plaintiff, MARSHA ROONEY ("MARSHA"), at all material times was and is a resident of Deland, Volusia County, Florida, living in a marital relationship with her husband, JOHN JR. She is the mother of Plaintiffs, KEITH and JOHN III.

7. Defendant, GEORGE LEE WATSON ("WATSON"), at all material times was an employee of COUNTY OF VOLUSIA in the Department of Public

Safety, employed as a sheriff's deputy/law enforcement officer.

8. Defendant, COUNTY OF VOLUSIA ("VOLUSIA COUNTY"), at all material times was and is a political subdivision of the State of Florida pursuant to Article VIII, § 1(g), Florida Constitution. At all material times, Defendant WATSON was an employee of VOLUSIA COUNTY's Department of Public Safety.

9. On or about January 23, 1989, at about 9:05 p.m., the Plaintiffs, KEITH and JOHN III, were in a truck owned by their parents and driven by JOHN III with their parents' consent, traveling northbound on State Road 11 near Reynolds Road, Volusia County, Florida, and within the speed limit. Defendant WATSON was in a vehicle owned by Defendant VOLUSIA COUNTY traveling southbound on State Road 11 at a high rate of speed, far exceeding the speed limit of 55 miles per hour. Plaintiff, JOHN III, seeing headlights a considerable distance away but not knowing the oncoming car was speeding, attempted to turn left onto Reynolds Road, believing he had ample time to clear the intersection ahead of the approaching vehicle. Defendant WATSON, traveling at approximately 75 miles per hour without lights or sirens on, struck the ROONEYS' vehicle, grievously injuring the Plaintiffs.

10. All conditions precedent to bringing this action have been met; VOLUSIA COUNTY and Florida Department of Insurance were served with Notices of Intent to bring litigation pursuant to *Fla Stat.* § 768.28 within the statutorily required time period.

COUNT I

CIVIL RIGHTS VIOLATION, 42 U.S.C. § 1983

Plaintiffs reallege Paragraphs 1 through 10 as though fully set forth herein and further allege:

11. Deputy WATSON, at all material times, was in the course of his employment with VOLUSIA COUNTY and acting under color of state law.

12. Deputy WATSON, at all material times, was acting pursuant to a persistent and widespread practice of VOLUSIA COUNTY's Department of Public Safety, in which he and fellow VOLUSIA COUNTY employees operated their county vehicles, i.e., dangerous instrumentalities, with indiscriminate use of speed. Speeding by sheriff's deputies in VOLUSIA COUNTY for non-emergency matters, particularly without the use of lights or sirens, was a common and widespread practice of which the Defendant VOLUSIA COUNTY had actual or constructive knowledge and failed to correct, displaying a deliberate indifference toward police misconduct that had a tendency to violate, and did violate, citizens' civil rights. Additionally or in the alternative, VOLUSIA COUNTY improperly trained their deputies, including Defendant WATSON, in the use of their vehicles, particularly in the specific use and handling of the vehicles at high speeds. This policy of indiscriminate use of speed violated citizens' constitutional rights such that the need for further training was or should have been plainly obvious to VOLUSIA COUNTY policymakers who, at least until the time of this accident, were deliberately indifferent to the need.

13. Defendant VOLUSIA COUNTY'S tacit knowledge and approval of Defendant WATSON's indiscriminate use of high speed, and/or VOLUSIA COUNTY's failure to properly train deputies including WATSON in the proper use of their vehicles at high speeds, subjected the Plaintiffs to a deprivation of their rights to life, liberty and property; their rights to procedural due process; and their rights to travel protected by the privileges and immunities clause, all guaranteed by the United States Constitution.

14. This deprivation of Plaintiffs' civil rights has resulted in injuries and damage to the Plaintiffs, all in violation of 42 U.S.C. § 1983.

WHEREFORE, Plaintiffs demand judgment against the Defendants for damages, interest, costs and attorneys fees pursuant to 42 U.S.C. § 1983, and further demand trial by jury.

COUNT II

NEGLIGENCE, FLA. STAT. § 768.28

Plaintiffs reallege Paragraphs 1 through 10 as though fully set forth herein and further allege in addition, or in the alternative:

15. At the time and place described in Paragraph 9 above Defendant WATSON negligently operated or maintained the vehicle owned by Defendant VOLUSIA COUNTY so that it collided with Plaintiffs' motor vehicle.

16. As a result, Plaintiffs KEITH and JOHN ROONEY III suffered bodily injury and resulting pain and suffering, disability, disfigurement, mental anguish,

loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, loss of earnings, loss of ability to earn money and aggravation of a previously existing condition. Their losses are either permanent or continuing and Plaintiffs will suffer the losses in the future. Plaintiffs' automobile was also damaged and they lost the use of it during the period required for its repair or replacement.

17. As a further result, Plaintiffs JOHN JR. and MARSHA ROONEY suffered loss of their childrens' services and affections, loss of property, and all other damages they may claim as a matter of right.

WHEREFORE, Plaintiffs demand judgment for damages against Defendants and further demand trial by jury.

DATED: February 17, 1994.

JOANNE FANIZZA, ESQ.
FERRERO AND
MIDDLEBROOKS, P.A.
Attorney for Plaintiffs
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Dade: (305) 949-2784

BY: /s/ Joanne Fanizza
JOANNE FANIZZA,
ESQ.
Florida Bar # 746940

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. mail to CHARLES TINDELL, ESQ., Tindell & Beck, 406 North Wild Olive Avenue, Post Office Box 5666, Daytona Beach, Florida 32118; and to TURA BROUGHTON, ESQ., Assistant County Attorney, 123 West Indiana Avenue, Deland, Florida 32720-4613, this 17th day of February, 1994.

By: /s/ Joanne Fanizza
JOANNE FANIZZA
Florida Bar No. 746940
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